

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 1/24/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

In re the Matter of:) No. 1 CA-CV 11-0385
)
BRENDA MORENO,) DEPARTMENT D
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) Not for Publication
v.) (Rule 28, Arizona Rules
) of Civil Appellate Procedure
JOSE A. SILVA, JR.,)
)
Respondent/Appellee.)
_____)
ROSA M. MARTINEZ,)
)
Intervenor/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-006029 and FC2010-071407 (Consolidated)

The Honorable Robert E. Miles, Judge

AFFIRMED

Law Offices of Otilia M. Diaz
By Otilia M. Diaz
Attorneys for Petitioner/Appellee

Phoenix

Rosa M. Martinez
In *Propria Persona* Intervenor/Appellant

Surprise

G E M M I L L, Judge

¶1 Rosa Martinez ("Grandmother") appeals the family court's order denying her petition for visitation with her grandchildren. For the reasons set forth in this memorandum decision, we affirm. In an opinion issued contemporaneously with this decision, we conclude that Brenda Moreno ("Mother") is entitled to an award of attorneys' fees. Only our resolution of Mother's request for attorneys' fees warrants publication. See ARCAP 28(g); Ariz. R. Sup. Ct. 111(h).

FACTS¹ AND PROCEDURAL HISTORY

¶2 Grandmother is the mother of Jose Silva ("Father"). Father and Mother were married in July 2000 and have two sons together, born in 2000 and 2004. In February 2008, the couple was granted a divorce with Mother as sole legal custodian of the children and Father retaining parenting time. In that proceeding, neither parent was deemed unfit.

¶3 In September 2010, Grandmother petitioned the court for visitation with her two grandsons. Both Father and Mother

¹ Grandmother did not cite to the record in the opening brief as required by Arizona Rules of Civil Appellate Procedure 13(a)(4). We therefore rely on our own review of the record and on the answering brief's cited facts. See *State Farm Mutual Auto Ins. Co. v. Arrington*, 192 Ariz. 255, 257 n.1, 963 P.2d 334, 336 n.1 (App. 1998). Failure to cite proper authority can constitute abandonment and waiver of a claim. See *State v. Moody*, 208 Ariz. 424, 452 n. 9, ¶ 101, 94 P.3d 1119, 1147 n. 9 (2004). Because we prefer to decide appeals on the merits, however, we choose in our discretion to address Grandmother's substantive arguments.

believed that visitation by Grandmother was not in the children's best interests. After an evidentiary hearing, the family court determined that grandparent visitation would not be in the children's best interests and denied Grandmother's petition in a signed order filed March 24, 2011 (hereinafter "Order"). Grandmother timely appeals and we have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") section 12-2101(A) (Supp. 2011).

ANALYSIS

¶4 In describing the issue on appeal, Grandmother raises only the question of whether A.R.S. § 25-409² (2007) ("Grandparent Visitation Statute") is constitutional. As we understand her argument, she is arguing that the family court must have erroneously found the statute was unconstitutional because she was not granted any visitation with her grandsons. We will briefly address the constitutionality of the Grandparent Visitation Statute, and in considering the additional assertions in Grandmother's brief, we will also address whether the family court abused its discretion in denying Grandmother any visitation.

² This section was recently amended by 2012 Ariz. Sess. Laws, ch. 309, § 20 (2d Reg. Sess.); however, the changes are not material to our analysis.

A.R.S. Section 25-409 Is Constitutional

¶15 We review issues of constitutional law *de novo*. *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, 327, ¶ 6, 972 P.2d 658, 660 (App. 1998). "We presume a statute to be constitutional and will not declare an act of the legislature unconstitutional unless convinced beyond a reasonable doubt that it conflicts with the federal or state constitutions." *Graville v. Dodge*, 195 Ariz. 119, 123, ¶ 17, 985 P.2d 604, 608 (App. 1999).

¶16 In 2000 and 2001, this Court held that the Grandparent Visitation Statute "is constitutional on its face," and concluded that the statute "satisfies the due process concerns articulated" by the United States Supreme Court. *McGovern v. McGovern*, 201 Ariz. 172, 177, ¶¶ 13-14, 33 P.3d 506, 511 (App. 2001) (citing *Jackson v. Tangreen*, 199 Ariz. 306, 310, ¶ 14, 314, ¶ 31, 18 P.3d 100, 104, 108 (App. 2000)). Further, this court clarified that "by applying the statute as written, Arizona courts do not violate the Due Process Clause." *Id.* at 177, ¶ 13, 33 P.3d at 511; see also *Egan v. Fridlund-Horne*, 221 Ariz. 229, 233, ¶ 12, 211 P.3d 1213, 1217 (App. 2009) (recognizing validity of the Grandparent Visitation Statute by incorporating *McGovern* analysis in holding).

¶17 Grandmother claims the family court held the Grandparent Visitation Statute to be unconstitutional by its

Order. The family court, however, recognized and applied the Grandparent Visitation Statute as written. The Order states in part: "A.R.S. § 25-409 provides that the Court may grant a grandparent's request for visitation with a grandchild in certain circumstances." Grandmother does not identify any evidence or portion of the record upon which she bases her claim that the family court considered the Grandparent Visitation Statute to be unconstitutional. We confirm the constitutionality of the Grandparent Visitation Statute and reject Grandmother's argument that the family court necessarily or implicitly ruled that the Grandparent Visitation Statute was unconstitutional. Simply because the court denied her requested visitation does not mean the court concluded that the Grandparent Visitation Statute was unconstitutional.

**The Evidence Supports the Family Court's
Denial Of Grandmother's Visitation Petition**

¶18 We apply an abuse of discretion standard when reviewing the family court's decision to grant or deny grandparent visitation. *McGovern*, 201 Ariz. at 175, ¶ 6, 33 P.3d at 509. The family court abuses its discretion "when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision." *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (citation omitted).

¶9 A family court may grant reasonable visitation rights to the grandparents of a child whose parents' marriage has been dissolved for at least three months if the court finds visitation to be in the child's best interests. A.R.S. § 25-409(A). Under these circumstances, the court shall consider all relevant factors to determine the best interests of the child, including:

1. The historical relationship, if any, between the child and the person seeking visitation.
2. The motivation of the requesting party in seeking visitation.
3. The motivation of the person denying visitation.
4. The quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities.
5. If one or both of the child's parents are dead, the benefit in maintaining an extended family relationship.

A.R.S. § 25-409(C).

¶10 In making its determination under the Grandparent Visitation Statute, the family court is required to recognize and apply a rebuttable presumption that "a fit parent acts in his or her child's best interest in decisions concerning the child's care, custody and control, including decisions concerning grandparent visitation." *McGovern*, 201 Ariz. at 177, ¶ 17, 33 P.3d at 511. A fit parent's determination of whether

visitation is in the best interests of the child should be given "special weight." *Id.* at 177-78, ¶ 18, 33 P.3d at 511-12.

¶11 Grandmother contends the family court abused its discretion by not considering the relevant factors in A.R.S. § 25-409(C). To the contrary, however, the family court documented its consideration of the relevant statutory factors within its Order, stating, "[h]aving considered all relevant factors, including those set forth in A.R.S. § 25-409(C), the Court concludes that Grandmother has not met the burden of rebutting the presumption." In addition, the family court specifically found that Father and Mother are fit parents – a finding that is fully consistent with the outcome of the previous divorce proceeding. Because they are fit parents, their determinations regarding visitation by family members and others, including Grandmother, are entitled to special weight and the rebuttable presumption. The evidence in the record supports the family court's decision that Grandmother did not meet her burden of rebutting the presumption, and we conclude that the court did not abuse its discretion.

CONCLUSION

¶12 For the foregoing reasons, we affirm the family court's ruling denying Grandmother's petition for visitation. As explained in the accompanying opinion, we grant Mother's

request (by a 2 to 1 vote) for an amount of reasonable attorneys' fees and costs on appeal.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Judge

_____/s/_____
ANDREW W. GOULD, Judge